A

AMAR SINGH SUNDAR SINGH & ORS

v.

JIVANJIT KAUR SOHAN SINGH

B

COURT OF APPEAL, PUTRAJAYA
HELILIAH MOHD YUSOF JCA
HISHAMUDIN MOHD YUNUS JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02-391-2004]

C

16 JUNE 2010

LAND LAW: *Licence - Occupation of land - Defendants in occupation - Recovery of land - Position of the 1st defendant on the land - Whether occupying as a licensee with consent (if so revocable or irrevocable) -*

D

Whether court cannot create a proprietary interest in land tenure arising from a licence within a family relationship

LAND LAW: *Occupation - Equitable estoppel - Proprietary estoppel - Right of the defendants to continue remaining on the portion of the land -*

E

Whether judge failed to make a proper judicial appreciation of the entire facts and has drawn improper inferences therefrom - Whether there is a serious misdirection of law including a failure to appreciate that the defendant has established a defence of proprietary estoppel - Whether claim goes beyond preventing or estopping plaintiff from enforcing her legal property rights

F

The plaintiff/respondent inherited the land held under GM 1164 Lot 4159 Mukim Batu (the said land) from her husband Balwant Singh, the 1st defendant/appellant's brother after her husband died in 1994. The defendants occupied the house built upon a 4,000

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square feet portion of the said land (the claimed portion). The plaintiff was now the registered owner of the said land. The defendants refused to move out and continued to occupy the house. According to the 1st defendant, his mother had told him on various occasions that the house belonged to him and his children. When

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his father passed away, his mother decided to transfer the whole of the said land to Balwant Singh with instructions to the latter that the building on the land be registered in the name of the 1st defendant. The 1st defendant later realized that his brother had not registered the building in his name. The said land was transferred

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to Balwant Singh on 25 January 1980 and then to the plaintiff upon his death. After the land was transferred to the plaintiff's name, she collected the rents and paid the quit rents and assessments. The

plaintiff issued a letter of demand to evict the defendants from the claimed portion on 7 October 1998. The plaintiff commenced an action in the High Court for, *inter alia*, vacant possession of the said land. In his defence, the defendant pleaded (a) "proprietary estoppel"; (b) that Balwant Singh held the land subject to the 1st defendant's equity and interest in respect of the building. The High Court allowed the plaintiff's action on 30 March 2004 and the defendants appealed to the Court of Appeal.

Held (dismissing the appeal with costs)
Per Heliliah Mohd Yusof JCA delivering the judgment of the court:

(1) The 1st defendant and his sons have not succeeded on a balance of probabilities of rebutting the plaintiff's legal status over the land which includes the claimed portion on which the house occupied by the 1st defendant and his sons was situated. The claim here went beyond preventing or estopping the plaintiff from enforcing her legal property rights and sought to transfer property rights to the 1st defendant and his sons. (para 7)

(2) The defendants were claiming the equity here. There was absolutely no evidence of a contractual arrangement other than a family arrangement. The evidence furnished by the 1st defendant did not establish anything to negate that the legal title to the said land does vest in the plaintiff. The 1st defendant's averment that he had expended monies was lacking in details and particulars. Neither was there evidence available to establish that the 1st defendant had collected rents or paid quit rents or assessments. (para 25)

(3) Here, it was unclear what elements of equitable estoppel were really being relied upon. The term "contemporaneous conduct" did not highlight what aspects of promises, acquiescence or expectations that had been established other than the duration of the occupation of the claimed occupation and the alleged inferences of conduct by the 1st defendant's mother and brother. There was also doubt about the elements to constitute proprietary estoppel and detriment was not properly indicated in the circumstances here. The equity that was sought to be enforced here was not only for the benefit of the 1st defendant but also to be extended to his sons. The 1st defendant chose not to take any action to lodge his claim earlier. Instead, he acted on a belief that some form of proprietary interest would

accrue due to the continuous stay on the claimed land. The equity that he was claiming did not fall within the National Land Code 1965 ("NLC"). (paras 3, 22, 28, 30 & 31)

(4) The 1st defendant had been permitted a licence. Although there was a degree of exclusive possession with his sons but it remained a licence. The 1st defendant had not succeeded in establishing a material fact that the alleged statements of his mother's intention amounted to more than statements of revocable present intention. The court was being asked to cause a metamorphosis of the licence to some form of unregistrable interest in the land not capable of recognition under the NLC that was to create a proprietary interest in land tenure arising from a licence within a family relationship. *Radaich v. Smith* (foll). (paras 32 & 36)

(5) The trial judge had not misdirected himself on a question of law. This was a family arrangement where the creation of an interest in the land would be beyond the scope of land tenure under the NLC. However the court ordered that vacant possession be given within six months from the date of this court's order. Apart from this modification, the appeal was dismissed with costs and the High Court order was affirmed. (para 37)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden mewarisi sekeping tanah di bawah GM 1164 Lot 4159 Mukim Batu ('tanah tersebut') dari suaminya Balwant Singh, abang kepada defendan pertama/perayu selepas suaminya meninggal pada tahun 1994. Defendan-defendan menduduki rumah yang dibina di atas 4,000 kaki persegi bahagian tanah tersebut ('bahagian yang dituntut'). Plaintif sekarang adalah pemilik berdaftar tanah tersebut. Defendan-defendan enggan pindah keluar dan terus menduduki rumah tersebut. Menurut defendan pertama, ibunya telah memberitahunya beberapa kali bahawa rumah tersebut adalah miliknya dan anak-anaknya. Apabila bapa defendan pertama meninggal dunia, ibunya telah membuat keputusan untuk memindah milik seluruh tanah tersebut kepada Balwant Singh dengan arahan-arahan tertentu bahawa bangunan atas tanah tersebut didaftarkan dalam nama defendan pertama. Defendan pertama kemudiannya sedar bahawa abangnya tidak mendaftarkan bangunan itu dalam namanya. Tanah tersebut dipindah milik ke Balwant Singh pada 25 Januari 1980 dan kepada plaintif dengan kematiannya. Selepas tanah tersebut dipindah milik ke nama plaintif, plaintif telah

mengutip sewa dan telah membayar cukai tanah dan taksiran. Plaintif mengeluarkan surat tuntut untuk mengusir defendan-defendan dari bahagian yang dituntut pada 7 Oktober 1998. Plaintif memulakan guaman di dalam Mahkamah Tinggi untuk *inter alia*, milikan kosong tanah tersebut. Dalam pembelaannya, defendan memplidkan (a) 'estopel proprietari'); (b) bahawa Balwant Singh memegang tanah tersebut tertakluk kepada ekuiti dan kepentingan bangunan tersebut. Mahkamah Tinggi membenarkan tindakan plaintif pada 30 Mac 2004 dan defendan-defendan merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Defendan pertama dan anak-anaknya tidak berjaya atas imbangan kebarangkalian mencabar status plaintif di sisi undang-undang ke atas tanah yang merangkumi bahagian yang dituntut di mana rumah yang diduduki defendan pertama dan anak-anaknya terletak. Tuntutan di sini bertindak lebih jauh dari menghalang atau mengestop plaintif dari melaksanakan hak-hak plaintif ke atas tanah dari segi undang-undang dan menuntut untuk memindahmilik hak-hak ke atas tanah kepada defendan pertama dan anak-anaknya.

(2) Defendan-defendan menuntut ekuiti di sini. Tidak terdapat keterangan persetujuan secara kontrak selain dari apa telah dipersetujui oleh keluarga. Keterangan yang diberi oleh defendan pertama tidak membuktikan apa-apa untuk menidakkan hak di sisi undang-undang yang diletakhak ke plaintif. Dakwaan defendan pertama bahawa beliau telah membelanja duit mempunyai kekurangan butir-butir yang diperlukan. Juga tidak terdapat keterangan yang sedia ada untuk membuktikan bahawa defendan pertama telah mengutip duit sewa atau membayar cukai tanah atau taksiran.

(3) Di sini, ia tidak jelas apakah elemen-elemen estopel ekuiti yang dirujuk. Terma 'kelakuan spontan' tidak menyerlahkan apa-apa aspek perjanjian, persetujuan atau jangkaan yang telah dibuktikan selain dari jangkamasa penghunian dan inferens-inferens tindakan yang didakwa oleh ibu kepada defendan pertama dan abangnya. Juga terdapat keraguan mengenai elemen-elemen untuk membentuk estopel proprietari dan detrimen tidak ditunjukkan di dalam keadaan di sini. Ekuiti yang dituntut di sini tidak untuk kepentingan defendan pertama sahaja tetapi

untuk anak-anaknya juga. Defendan pertama memilih untuk tidak memfailkan tuntutan sebelum ini. Sebaliknya, beliau bertindak atas kepercayaan bahawa kepentingan milikan akan timbul berdasarkan penghunian berterusan defendan-defendan ke atas tanah yang dituntut. Ekuiti yang dituntut oleh defendan pertama tidak termasuk di dalam Kanun Tanah Negara ('KTN').

(4) Defendan pertama telah diberi lesen. Walaupun terdapat tahap milikan eksklusif dengan anak-anaknya tetapi ia tetap lesen. Defendan pertama gagal membuktikan fakta material bahawa penyata-penyata yang didakwa adalah niat ibunya merupakan penyata-penyata yang melebihi penyata-penyata niat yang boleh dibatalkan. Mahkamah diminta untuk melakukan metamorfosis lesen untuk menjadikan kepentingan yang tidak berdaftar ke atas tanah yang tidak boleh diiktiraf di bawah KTN untuk membentukkan kepentingan proprietari ke atas pemegangan tanah yang timbul dari lesen perhubungan keluarga. *Radaich v Smith* (diikuti).

(5) Hakim bicara tidak tersalah arah atas persoalan undang-undang. Ini adalah persetujuan keluarga di mana kewujudan kepentingan tanah akan melampaui skop pemegangan tanah di bawah KTN. Walaubagaimanapun mahkamah telah memerintah bahawa milikan kosong diberi dalam tempoh enam bulan dari tarikh perintah mahkamah ini. Selain dari pindaan ini, rayuan ditolak dengan kos dan keputusan Mahkamah Tinggi diesahkan.

Case(s) referred to:

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 BLJ 27 HC ***(refd)***

Crabb v. Arun DC [1976] Ch 179 CA ***(refd)***

Gillet v. Holt and Another [2000] 2 All ER 289 ***(refd)***

Inwards v. Baker [1965] 1 All 446 ***(refd)***

Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 124; [1981] CLJ (Rep) 69 FC ***(refd)***

Pascoe v. Turner [1979] 2 All ER 945 ***(refd)***

Radaich v. Smith [1959] 101 CLR 2009 ***(foll)***

Ramsden v. Dyson [1866] LR 1 HL 129 ***(refd)***

Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] 1 QB 133 ***(refd)***

The Commonwealth of Australia v. Verwayen [1990] 170 CLR 394 ***(foll)***

United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC ***(refd)***

Waltons Stores (Interstate) Ltd v. Maher [1988] 164 CLR 387 ***(refd)***

Willmot v. Barber [1880] 15 Ch D 96 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 3(1), 6
National Land Code, s. 206(1), (2), (3)

For the appellants - Dato' Harpal Singh Grewal (Parvinder Singh Doal with him); M/s Pritam Doal & Co
For the respondent - T Gunaseelan; M/s Gunaseelan & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6(S3)-22-756-1998]

Reported by Susheila Sreedharan

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] This is an appeal against the decision of the High Court (HC) judge dated 30 March 2004 whereby the following orders were granted:

(a) Vacant possession be given within four weeks of the portion of the land under GM 1164 Lot 4159 Mukim Batu being occupied by the defendant;

(b) Rent to be assessed by the deputy registrar as from the date notice of 7 October 1998;

(c) Interest at 8% from date of judgment to settlement;

(d) Costs; and

(e) The defendant's caveat to be withdrawn within four weeks.

[2] The respondent in this appeal is the plaintiff while the appellants are the defendants in the original action. Hereinafter the respondent and the appellants shall be referred to as the plaintiff and defendants respectively. In the appeal before us the central argument is the right if any of the defendants to continue to remain on the portion of the land as mentioned above. In the grounds of judgment the facts as elucidated are as follows:

(1) The plaintiff inherited the land held under GM 1164 Lot 4159 Mukim Batu, measures approximately 40,000 square feet (the said land) from her husband, Balwant Singh a/l Sunder Singh, the brother of the 1st defendant. They were married in 1956.

A The said land was transferred to the plaintiff on 13 January 1995 under an order of distribution under the Small Estates Distribution Act 1965 after Balwant Singh died in 1994.

(2) The defendants occupy the house 241-C, Sentul Pasar, 51100 B Kuala Lumpur, built upon a 4,000 square feet portion of the piece of land known as GM 1164 Lot 4159 in Mukim Batu (the claimed portion). The plaintiff is now the registered owner of the entire piece of land (the said land). The defendants have refused to move out and continued to occupy the said house.

C (3) According to the 1st defendant:

(a) He had lived on the said land with his parents since 1929. The 1st defendant married in India in 1949. He returned to Kuala Lumpur with his wife the following year. At that D time, his mother was the registered owner.

(b) His mother told him to build his home on the claimed portion, which he did. He had thus built the house known as 241-C and occupied it since 1952. According to the 1st E defendant, his mother had told him on various occasions that the house belonged to him and his children. In addition he had built a further ten units of houses on the said land to be rented out. The rent had supported his mother. The 1st defendant said he maintained and improved F the buildings between 1952 and 1980.

(c) When his father passed away on 30 December 1979, his mother decided to transfer the whole of the said land to Balwant Singh with instructions to the latter that the said building on the claimed land to be registered in the name G of the 1st defendant. Balwant Singh and his family also lived on the said land. The 1st defendant said he had given a copy of his identity card to Balwant Singh but only realized through this action that he had not registered the building in his name. H

(d) The said land was transferred to Balwant Singh on 25 January 1980. On 8 September 1987, their mother passed away. Balwant Singh himself died on 11 May 1994. After the land was transferred to the plaintiff's name, she I collected the rents and paid the quit rents and assessments.

(e) The plaintiff issued a letter of demand to evict the defendants from the claimed portion 241-C on 7 October 1998. A

(f) On 2 March 1999, the 1st defendant entered a private caveat on the land. B

4. In his defence in this action the defendant pleaded (a) "proprietary estoppel"; (b) that Balwant Singh held the land subject to his equity and interest in respect of the building.

[3] We have examined the grounds of judgment of the learned HC judge dated 30 March 2004. There are various complaints advanced in support of the appeal but primarily they are as follows: C

1. The judge has failed to make a proper judicial appreciation of the entire facts and has drawn improper inferences therefrom; D

2. There is a serious misdirection of law including a failure to appreciate that the appellant has established a defence of proprietary estoppel.

[4] Submissions have also been made that the plaintiff is bound by the statement of claim (or SC) which has been crafted in such a way that the defendants are in occupation of certain portions of land belonging to the plaintiff upon which has been built a building. The SC also claims that despite repeated requests being made the defendants have failed to comply or ignored the requests for the first appellant and his sons to vacate. It is averred that the occupation of the said land by the defendants is unlawful as it was so occupied without the express or implied consent of the plaintiff. The SC referred to the allegation made by the defendant *vide* letter dated 5 November 1998 that the defendant is the registered owner of the immoveable property in question and that his two sons have the right to occupy the property concerned. E F G

[5] The defence claimed that even if the said land is held under a legal title it is held subject to the beneficial and equitable interests not only of the first defendant but also of his sons. The counter claim of the defendants went beyond, in that there is a claim to legal ownership. H

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[6] In the course of his judgment the learned trial judge made observations which constitute specific findings of facts. Before referring to the specific findings it is also noted that the dispute has arisen out of family relationship or arrangements. At the outset the parties were urged to contrive some effort towards attaining a settlement on the dispute since the 1st defendant is none other than the brother-in-law of the plaintiff but this was of no avail. We then proceeded to hear the appeal.

[7] Before us it is alleged that there has been a failure to appreciate the facts judicially. However having appraised the evidence it cannot be said that the 1st defendant and his sons have succeeded on a balance of probabilities of rebutting the plaintiff's legal status over the land which includes the claimed portion on which is sited a dwelling house occupied by the 1st defendant and his sons.

[8] The learned trial judge has made certain findings of facts which have been assailed in this appeal. It has been vociferously contended that the plaintiff has failed in the assertion that the character of occupation is a temporary license since that issue relate to facts occurring before 1956, and hence it is to be treated as a non issue since the plaintiff, having arrived on the scene only sometime in 1956, could not therefore have known herself about the nature of occupation. With regard to the issue of facts the learned trial judge, inter alia, has made certain observation:

> The 1st Defendant relied upon his own testimony (as DW4) and that of his sons (DW1 and DW2) who were born in 1956 and after. Obviously, the sons cannot testify as to what occurred in 1950-1952 when house 241-C was built.
>
> The Plaintiff said that the 1st Defendant moved into 241-C in 1956 after a misunderstanding. She said the 1st Defendant moved into 241-C from 241-A where they had been living together with their parents in 1959 after a misunderstanding between them and their parents and her family. Their relationship had not been good. She said the 2nd Defendant moved in with the 1st Defendant in mid-November 2001 but does not disagree that the 3rd Defendant stayed with the 1st Defendant. Her version is denied by the 1st Defendant.
>
> Regardless whether there was a misunderstanding or not, it means it is conceded by the Plaintiff that the Defendant had moved into 241-C at least by 1956, and had stayed there since. He stayed there obviously with the consent of the mother. It cannot be adverse

> occupation. The land was transferred to Balwant Singh from 25/1/1980. Similarly, the Defendants occupied with the consent of Balwant Singh. It was not adverse occupation. It is clear he had license to occupy house 241-C. But the question remains whether he had a permanent license to do so.

[9] The occupation of the appellant of house 241-C by the 1st appellant together with his sons has been described as a "license to occupy" but not permanent by the trial judge.

[10] However it has been contended before us that since the defendants have been in occupation with the consent of his mother and subsequently with the consent of Balwant Singh, there has been a failure to appraise "uncontroverted evidence of contemporaneous conduct" and consequently a failure to make a finding that a proprietary estoppel has arisen. However in so far as events are concerned we accept that the defendant's sons, not having been born before 1956, could not reinforce the 1st defendants contention about the character of his occupation of the 241-C on the said land. This fact is neutral.

[11] The reliance on the consent although allegedly contemporaneous of conduct needs further evaluation as there is not in existence any form of contractual tenancy. The 1st defendant depends on the verbal assurances of his mother and the conduct of his brother in requesting for his identity card on one occasion where the reasons for which are not known. They are now deceased persons. There are gaps and lapses in the case of the 1st defendant. For example, where are the accounts which at the very least, establish the disbursements that have been expended in building homes or maintaining the houses or the other parts of the land alleged by the 1st defendant as his contributions.

[12] What is the proprietary estoppel here. Learned counsel for the appellant cited *Mok Deng Chee v. Yap See Hoi & Ors* [1981] CLJ 124; [1981] CLJ (Rep) 69 and *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 BLJ 27:

> The law on tenancy coupled with an equity or simply an equitable estoppel arose from from the speech of Lord Kingsdown in *Ramsden v. Dyson* [1866] LR 1 HL 129, in which his Lordship referred to the principle as irrevocable license. This principle was accepted and applied by the Privy Council in *Plimmer v. The City of Wellington* [1884] 9 AC 699. Finally it received its judicial refinement in *Inwards v. Baker* [1965] 1 All ER 446, 448. In this case Lord Denning M.R. defined the concept as follows:

> It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a license coupled with equity … that the equity arising from the expectation of land does not fail … The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.

The principle is also known as equitable estoppel, because the landowner whose conduct had raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

In the development of our law, this principle was recognised as long ago as 1916 in the case of *MPRL Karuppan Chetty v. Suah Thian* [1916] 1 FMSLR 300. It was applied by Chang Min Tat J, as he then was, in *Devi v. Francis* [1969] 2 MLJ 169. Finally it became settled law as a result of the decision of the Federal Court in *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 2 MLJ 105 F.C., which decision was subsequently confirmed by the Privy Council. Its practical application was demonstrated in the decision of Syed Othman J., whose judgment was conformed by the Federal Court in *Tan Swee Hoe Company Ltd v. Ali Hussein Bros* [1980] 1 MLJ 89; [1980] 2 M.L.J. 16 and in the decision of Abdoolcader J in *Wong Yon Oin v. Liew Tham Soon & Ors* [1980] 2 M.L.J. 99.

[13] It is notable that both cases rely on the speeches of Lord Kingsdown in *Ramsden v. Dyson* [1866] LR 1 HL 129 and the judicial refinement of Lord Denning MR in *Inwards v. Baker* [1965] 1 All 446, 440 to advance the contention that proprietary estoppel has been held to be applicable under the Torrens System in Malaysia.

[14] The judicial precedents cited by counsel for the appellants refer to instances where there is some arrangement founded on tenancies, leases or even a contractual relationship. By asserting the doctrine of proprietary estoppel the effect is to prevent or estop the plaintiff from enforcing her legal property rights. But the claim here goes beyond that and seeks in addition to transfer property rights to the 1st defendant and his sons. As for the formulation of the elements of proprietary estoppel some guidance may be sought from Commonwealth precedents. In *Willmot v. Barber* [1880] 15 Ch D 96, Fry J laid down what is termed as the 5 probanda which he perceived to be vital in establishing proprietary estoppel:

> In the first place the (claimant) must have made a mistake as to his legal rights. Secondly, the (claimant) must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the (claimant). If he does not know of it then he is in the same position as the (claimant) and the doctrine of acquiescence is founded upon conduct with knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the (claimant)'s mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own legal rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the (claimant) in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do ...

[15] In *Crabb v. Arun DC* [1976] Ch 179 CA, 188 c-d Scarman LJ, stated:

> Short of an actual promise, if a man by his words or conduct so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intruding that the other will act on that belief - and he does so, that again will raise an equity in favour of the other.

[16] In the statement of the elements of proprietary estoppel frequent reference has been made to the dissenting speech of Lord Kingsdown where it is stated in *Ramsden v. Dyson* [1866] LR 1 HL, 129:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money on the land a court of equity will compel the landlord to give effect to such promise.

[17] However in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147 g-h, Oliver J stated:

> In Lord Kingsdown's examples ... for instance, there is no room for the literal application of the probanda, for the circumstances there postulated do not presuppose a mistake on anybody's part but the

A fostering of an expectation in the minds of both parties at the time but from which once it had been acted upon, it would be unconscionable to permit the landlord to depart.

[18] It has to be expressed with remonstrance that in the appeal before us it is not ventilated with clarity what elements of equitable B estoppel are really being relied upon. The term "contemporaneous conduct" does not draw forth what aspects of promises, acquiescence or expectation that have been established other than the duration of the occupation of the claimed occupation and the alleged inferences of conduct by the 1st defendant's mother and brother. Judicial C precedents indicate that incidents of proprietary interests may emerge from promissory estoppel. On account of the lack of clarity of counsels it becomes incumbent to refer to the following.

[19] *The Commonwealth of Australia v. Verwayen* [1990] 170 CLR D 394 is not a case on occupation of a land. It is on negligence but the statements contained therein are instructive. Mason CJ opined:

> ... That brings me to estoppel, a label which covers a complex array of rules spanning various categories. There are the divisions E between common law and equitable estoppel, between estoppel by conduct and estoppel by representation, and the distinction between present and future fact. There are titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence. Yet all of these categories and distinctions are intended to serve the same fundamental purpose, namely "protection against the detriment F which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted": *Waltons Stores*, per Brennan J See also per Mason CJ and Wilson J.; *Grundt*.
>
> At common law the principle of estoppel by conduct or representation ("estoppel in pais") provided that protection by G preventing the party stopped from unjustly departing from an assumption of fact which his conduct had caused another party to adopt or accept for the purpose of their legal relations: *Grundt; Thompson v. Palmer*; *Waltons Stores*. But it was well established that, in order to support an estoppel by conduct, the representation (or H assumption) must be a representation of an existing fact, a promise or representation of intention to do something being insufficient for that purpose: *Yorkshire Insurance Co v. Craine*.
>
> The principle of estoppel by conduct or representation applied in equity, as at common law, though in equity the principle was I known as equitable estoppel: *Jorden v. Money*; *Thompson v. Palmer*; *Waltons Stores*. And in equity it was also well settled that the representation (or assumption) must be of an existing fact, not of

future fact or mere intention. That is what *Jorden v. Money* decided, despite the fact, as Bowen L.J. pointed out in *Edgingtion v. Fitzmaurice*, that "the state of a man's mind is as much a fact as the state of his digestion". This limitation upon the principle of estoppel was seemingly founded upon the notion that to hold a person to an assumption which his conduct has caused another to adopt or accept was tantamount to enforcing a voluntary promise in the absence of consideration. The need to avoid this consequence was an important aspect of the majority reasoning in *Jorden v. Money*.

However, neither the decision nor the reasoning in that case can now be sustained. Promissory estoppel, recognized by this Court in *Legione v. Hateley*, has undermined the idea that voluntary promises cannot be enforced in the absence of consideration. What is more, promissory estoppel has an extensive area of operation now that it is acknowledged that the doctrine is not confined to pre-existing contractual relationships: see *Waltons Stores*. Furthermore, the acceptance of the doctrine of promissory estoppel has been accompanied by a recognition that the distinction between present and future fact is unsatisfactory and produces arbitrary results instead of serving any useful purpose: *Moorgate Ltd. v. Twitchings*; *Waltons Stores*; *Foran v. Wight*. Indeed, the difference between the majority and Lord St. Leonards in *Jorden v. Money* was a striking illustration of the arbitrary nature of the distinction.

In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted, these developments have brought a greater underlying unity to the various categories of estoppel. Indeed, the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules: see *Waltons Stores*; *Foran v. Wight*; *Collin v. Holden*; *Taylors Fashions Ltd. v. Liverpool Trustees Co.*; *Alamgamated Investment & Property Co Ltd. v. Texas Commerce International Bank Ltd.*; *Attorney-General (Hong Kong) v. Humphreys Estate (Queen's Gardens) Ltd*.

One obstacle to the existence of a single overarching doctrine is a suggested difference in the nature of estoppel by conduct on the one hand and equitable estoppel (including promissory estoppel) on the other and in the character of the protection which they respectively provide. Traditionally, estoppel by conduct has been classified as a rule of evidence, available where there is a cause of action, to prevent a person from denying what he previously represented, and has not itself constituted a cause of action: *Grundt*; *Low v. Bouverie*. Being an evidentiary principle, estoppel by conduct achieved, and

could only achieve, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs. The rights of the parties were ascertained and declared by reference to that state of affairs. On the other hand, equity was more flexible. Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment. To do more would sit uncomfortably with a general principle whose underlying foundation was the concept of unconscionability. So, in *Waltons Stores*, a majority of this Court concluded that equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct and to do justice between the parties. Mason C.J. and Wilson J. referred to the statement of Scarman L.J. in *Crabb v. Arun District Council*, that the court should determine what was "the minimum equity to do justice to the plaintiff". We went on to state: "Holding the representor to his representation is merely one way of doing justice between the parties." Similarly, Brennan J. Said:

> The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case. As Robert Goff J. said in *Amalgamated Property Co. v. Texas Bank*: 'Of all doctrines, equitable estoppel is surely one of the most flexible.' ... However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct.

It follows that, as a matter of principle and authority, equitable estoppels will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more. In appropriate cases, that will require that the party estopped be held to the assumption created, even if that means the effective enforcement of a voluntary promise. To that extent there is an overlap between equitable estoppel generally and estoppel by conduct in its traditional form. But since the function of equitable estoppel has expanded and it has become recognized that an assumption as to future fact may ground an estoppel by conduct at common law as well as in equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results. Moreover, as I have already indicated, the fact that estoppel by conduct has expanded beyond its evidentiary function into a substantive doctrine means that there is no longer any justification for insisting on the making good of assumptions in every case.

In any event, there is a very strong case for saying that equity had discarded earlier the notion that the purpose of the rules of estoppel by conduct was to make good the relevant assumption. As Professor Finn points out in his essay "Equitable Estoppel" in Finn (ed.), *Essays in Equity* (1985), p. 68, "the language of expectations [was] forsaken entirely for that of 'equities' in *Crabb v. Arun District Council*. Lord Denning M.R. had qualified the language of expectations in *E.R. Ives Investment Ltd. v. High*, by stating that the "court will not allow (the) expectation to be defeated **when it would be inequitable so to do**" (emphasis added). That qualification, made repeatedly in cases which can be traced back to the Privy Council's statement in *Plimmer v. Mayor of Wellington* that "the Court must look at the circumstances in each case to decide in what way the equity can be satisfied", has transformed the basis of the equitable principles of estoppel: see Finn, at pp. 62-71.

In these circumstances, it would confound principle and common sense to maintain that estoppel by conduct occupies a special field which has as its hallmark function the making good of assumptions. There is no longer any purpose to be served in recognizing an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel. The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past of future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption. (See also the conclusion of Lord Denning M.R. in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.*).

The assumption may be one as to a legal as well as to a factual state of affairs. There is simply no reason to restrict the assumption to a factual matter as there was at the time when the rules of estoppel by conduct were evidentiary. It has already been recognized that an equitable estoppel may relate at least to a matter of mixed fact and law (see *Waltons Stores*; *Foran v. Wight*.). Moreover, the distinction between assumptions as to fact and assumptions as to law is artificial and elusive; see the discussion of Oliver J. in *Taylors Fashions Ltd. v. Liverpool Trustees Co*. So it would be productive only of confusion and arid technicality to restrict the operation of the

A doctrine so as to exclude from its scope an assumption as to a purely legal state of affairs. It is therefore not surprising that long ago the Judicial Committee recognized that a representation as to the legal effect of an agreement can give rise to an estoppel: *Sarat Chunder Dey v. Gopal Chunder Laha*; *Calgary Milling Co. Ltd. v.* B *American Surety Co. of New York*; see also *Amalgamated Property Co. v. Texas Bank*.

The element of detriment presents more difficulty. ... However, the question of detriment is not as simple as such an answer would suggest, and is closely related to the other elements of the claim of C estoppel.

When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which would result from the D denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.

The cases concerning estoppel by conduct, at least at common law, E were in one respect concerned with the broader concept of detriment. So, Dixon J. said in *Grundt* that "the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it". This makes it clear that the detriment must F flow from the reliance upon the assumption (see *Foran v. Wight*), but goes further and suggests that the relief granted by virtue of the estoppel (in that context, that making good of the assumption) corresponds with the detriment which would be suffered were the assumption to be deserted. However, that further suggestion was dictated by the then existing confines of the rules of estoppel by G conduct; Dixon J. was plainly stating that a person's "change of position" could not be allowed to "operate as a detriment". His Honour's exposition is now instructive as an indication that the detriment against which the law protects is that which flows from reliance upon the deserted assumption, even though at that time the H evidentiary rule operated to hold the representor to the assumption created.

In the same way, cases of equitable estoppel have been concerned to grant relief where detriment would be suffered if the assumed state of affairs upon which reliance had been placed was held not I to exist. But, as we have seen, the relief which equity grants is by no means necessarily to be measured by the extent of that detriment. So, while detriment in the broader sense is required in order to found an estoppel (and it would be strange to grant relief

> if such detriment were absent), the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.
>
> ... When a court approaches the task of ascertaining the minimum relief necessary to "do justice" between the parties, it is not correct to make an assessment of the moral rectitude of the actions of the parties in a manner divorced from a consideration of the legal consequences and attributes of those actions. Thus it must be borne in mind that a voluntary promise is generally not enforceable and that pleadings are susceptible of amendment. The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss. In the same way, with estoppel, something more than a broken promise is required.

[20] *Pascoe v. Turner* [1979] 2 All ER 945 related to facts which have some similarity:

> In the early 1960s the plaintiff, a businessman with investments consisting of private and commercial property, met and became friendly with the defendant, a widow with a small amount of invested capital. In 1968 the defendant moved into the plaintiff's home as his housekeeper and also helped him with his business. They subsequently lived as man and wife, although the defendant declined the plaintiff's offer of marriage. In 1965 they moved into a house which, together with the contents, was paid for by the plaintiff. The defendant continued to help the plaintiff in his business and was given £3 a week housekeeping. The defendant bought her own clothes and various small things for the house. In 1973 the plaintiff began a relationship with another woman, with whom he later went to live. The plaintiff then told the defendant that she had nothing to worry about and that the house and its contents were hers, but no conveyance was ever drawn up. The defendant continued to live in the house and, with the plaintiff's full knowledge and encouragement, spent a quarter of her modest capital on repairs, improvements and redecorations to the house. In 1976 the plaintiff and the defendant quarrelled. On 9th April, the plaintiff's solicitors wrote to the defendant giving her two months' notice to 'determine her licence to occupy' the house and demanded possession on 10th June. The defendant refused to leave the house. ...
>
> There was nothing in the facts from which a constructive trust could be inferred. Therefore, since the defendant had at law no perfected gift or licence other than a licence revocable at will, the court had to decide what was the minimum equity to do justice to

her, having regard to the way in which she had changed her position for the worse with the acquiescence and encouragement of the plaintiff.

[21] Cumming-Bruce LJ in his judgment said:

... The relevant principle is expounded in Snell on Equity in the passage under the heading 'Proprietary Estoppel', and is elaborated in Spencer Bower and Turner on Estoppel by Representation in the chapter entitled 'Encouragement and Acquiescence'. The cases in point illustrating that principle in relation to real property are *Dillwyn v. Llewelyn*, *Ramsden v. Dyson* and *Plimmer v. Mayor of Wellington*. One distinction between this class of case and the doctrine which has come to be known as 'promissory estoppel' is that where estoppel by encouragement or acquiescence is found on the facts those facts give rise to a cause of action. They may be relied on as a sword, not merely as a shield. In *Ramsden v. Dyson* the plaintiff failed on the facts, and the dissent of Lord Kingsdown was on the inferences to be drawn from the facts. On the principle, however, the House was agreed, and it is stated by Lord Cranworth LC and by Lord Wensleydale as well as by Lord Kingsdown. Likewise in *Plimmer*'s case the plaintiff was granted a declaration that he had a perpetual right of occupation.

The final question that arises is: to what relief is the defendant entitled on her counterclaim? In *Dillwyn v. Llewelyn* there was an imperfect gift of land by a father who encouraged his son to build a house on it for £14,000. Lord Westbury LC said:

> About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage settlement of B., A. would be bound to complete the title of the parties claiming under that settlement. So if A. puts B. in possession of a piece of land, and tells him "I give it to you that you may build a house on it", and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.

In *Plimmer*' case the Privy Council posed the question, 'How should the equity be satisfied?' And the Board declared that on the facts a licence revocable at will became irrevocable as a consequence of the subsequent transactions. So in *Thomas v. Thomas* the Supreme Court of New Zealand ordered the defendant to execute a proper transfer of the property.

In *Crabb v. Arun District Council* this court had to consider the principles on which the court should give effect to the equity: see per Lord Denning MR. Lawton and Scarman LJJ agreed with the remedy proposed by Lord Denning MR. On the facts of that case Scarman LJ expressed himself thus:

> I turn now to the other two questions-the extent of the equity and the relief need to satisfy it. There being no grant, no enforceable contract, no licence, I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence on terms to be agreed. I do not think it is necessary to go further than that. Of course, going that far would support the equitable remedy of injunction which is sought in this action. If there is no agreement as to terms, if agreement fails to be obtained, the court can, in my judgment, and must, determine in these proceeding on what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have. It is interesting that there has been some doubt amongst distinguished lawyers in the past as to whether the court can so proceed. Lord Kingsdown refers to those doubts in a passage, which I need not quote, in *Ramsden v. Dyson*. Lord Thurlow clearly thought that the court did have this power. Other lawyers of that time did not. But there can be no doubt that since *Ramsden v. Dyson* the courts have acted on the basis that they have to determine not only the extent of the equity, but also the conditions necessary to satisfy it, and they have done so in a great number and variety of cases. I need refer only to the interesting collection of cases enumerated in Snell on Equity. In the present case the court does have to consider what is necessary now in order to satisfy the plaintiff's equity.

So the principle to be applied is that the court should consider all the circumstances and, the counterclaimant having at law no perfected gift or licence other than a licence revocable at will, the court must decide what is the minimum equity to do justice to her having regard to the way in which she changed her position for the worse by reason of the acquiescence and encouragement of the

A legal owner. The defendant submits that the only appropriate way in which the equity can here be satisfied is by perfecting the imperfect gift as was done in *Dillwyn v. Llewelyn*.

[22] It is also found that the element of detriment is not properly indicated in the circumstances of this appeal. The judgment in B *Gillet v. Holt and Another* [2000] 2 All ER 289 is also relevant. An outline of the facts however are required:

> In 1952 G, who was then 12 years old, met and became friendly with H, a 38-year-old gentleman farmer and bachelor. Four years C later G left school on H's suggestion to work on his farm, and continued to work for him for nearly 40 years. During that time he moved into a property owned by H's company and, through his wife and children, effectively provided H with a surrogate family. Over the course of their relationship, H gave G repeated assurances, usually before an assembled company on special family D occasions, that he would inherit the farm business, and in 1986 executed a will leaving G his residuary estate. After 1992, the relationship between the two men began to cool, and in 1994 H executed a new will, naming W as chief beneficiary, but giving pecuniary legacies to G and his family and allowing G to occupy E his home for as long as he liked. The following year, H summarily dismissed G and made another will, excluding G entirely and removing the provision concerning the occupation of his home. G subsequently brought an action against H and W, claiming an equity in H's property under the doctrine of proprietary estoppel arising from reliance on the latter's assurances. In order to establish the F requisite element of detriment, G relied, *inter alia*, on his failure to seek or accept offers of employment elsewhere or to go into business on his own account, the carrying out of tasks beyond the normal scope of the employee's duty and his failure to take substantial steps to secure his future wealth.

G **[23]** Robert Walker LJ stated, *inter alia*:

> Both sides agree that the element of detriment is an essential ingredient of proprietary estoppel. There is one passage in the judgment of Lord Denning MR in *Greasley v. Cooke* [1980] 3 All H ER 710 at 713, [1980] 1 WLR 1306 at 1311 which suggests that any action in reliance on an assurance is sufficient, whether or not the action is detrimental. In *Watts v. Storey* Dunn LJ (who was a party to the decision in *Greasley v. Cooke*) explained Lord Denning MR's observations as follows:

I > Nor, if that passage from Lord Denning MR's judgment is read as a whole, was he stating any new proposition of law. As the judge said, it matters not whether one talks in terms of detriment or whether one talks in terms of it being unjust

> or inequitable for the party giving the assurance to go back on it. It is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, ie an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance was given had suffered some prejudice or detriment.

The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.

There are some helpful observations about the requirement for detriment in the judgment of Slade LJ in *Jones v. Watkins* [1987] CA Transcript 1200. There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded-that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved.

As authority for the second of these observations Slade LJ referred to Spencer Bower and Turner *Law Relating to Estoppel by Representation* (3rd edn, 1977) p110, which in turn cites the judgment of Dixon J in *Grundt v. Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641 at 674-675 (High Court of Australia):

> One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from

A which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice.

[24] There are also enlightening statements found in *Waltons Stores (Interstate) Ltd v. Maher* [1988] 164 CLR 387 bearing in mind however that it is a case concerning contractual relationship. In that case there arose an issue about the negotiations for a lease and whether a lease has been concluded. Brennan J in his grounds of judgment considered extensively the question of promissory estoppel giving rise to an obligation. The relevant portions of his judgment are cited as follows:

The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case. As Robert Goff J. said in *Amalgamated Property Co v. Texas Bank*: "Of all doctrines, equitable estoppel is surely one of the most flexible." Sometimes it is necessary to decree that a party's expectation be specifically fulfilled by the party bound by the equity; sometimes it is necessary to grant an injunction to restrain the exercise of legal rights either absolutely or on condition; sometimes it is necessary to give an equitable lien on property for the expenditure which a party has made on it: see *Snell's Principles of Equity*, 28th ed. (1982), p. 562. However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct. What, then, is unconscionable conduct? An exhaustive definition is both impossible and unnecessary, but the minimum elements required to give rise to an equitable estoppel should be stated.

Some indication of what constitutes unconscionable conduct can be gleaned from the instances in which an equity created by estoppel has been held to arise. If cases of equitable estoppel are in truth but particular instances of the operation of the general principles of

equity, there is little purpose in dividing those cases into the categories of promissory and proprietary estoppel which are not necessarily exhaustive of the cases in which equity will intervene. Like Scarman L.J. in *Crabb v. Arun District Council*, I do not find it generally helpful to divide into classes the cases in which an equity created by estoppel has been held to exist. However, the familiar categories serve to identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel. In cases of promissory estoppel, the equity binds the holder of a legal right who induces another to expect that that right will not be exercised against him: see, e.g., *Hughes v. Metropolitan Railway Co.*; *Birmingham & District Land Co. v. London & North Western Railway Co.*; *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*; *Bank Negara Indonesia v. Philip Hoalim*. In cases of proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him: see *Ramsden v. Dyson*; *Plimmer v. Wellington Corporation*; *Inwards v. Baker*. In cases where there has been an imperfect gift of property the equity binds the donor of the property when, after the making of the imperfect gift, he does something to induce the donee to act on the assumption that the imperfect gift is effective or on the expectation that it will be made effective: see *Dillwyn v. Llewelyn*; *Olsson v. Dyson*.

In all cases where an equity created by estoppels is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation. The assumption or expectation does not relate to mere facts, whether existing or future. (An assumption as to a legal relationship may be an assumption that there is no legal relationship, as in the cases where A builds on B's land assuming it to be his own). Though the party raising the estoppel may be under no mistake as to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party who induced the assumption or expectation. The assumption or expectation may involve an error of law. Thus a promissory or a proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration. But, if the party raising the estoppel is induced by the other party's promise to adopt an assumption or expectation, the promise must be intended by the promisor and understood by the promisee to affect their legal relations. In *Combe v. Combe* Denning L.J., the chief modern proponent of equitable estoppel, emphasized this element:

> The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was **intended to affect the legal**

A **relations between them and to be acted on accordingly**, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the
B qualification which he himself has to introduced, even though it is not supported in point of law by any consideration but only by his word.

(Emphasis added)

C However, his Lordship's enunciation of the principle does not bring out the basic object of the doctrine which, like the object of estoppel in pais, is to avoid the detriment which the promisee would suffer if the promisor fails to fulfil the promise. It will be necessary to return to consider the basic object of the doctrine, but
D for the moment it is important to observe that the doctrine has no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations.

E **[25]** In the appeal before us, it is not the plaintiff but the defendants who are claiming the equity. One question to be raised here is, what exactly is the position of the 1st defendant on the land. Is he occupying as a licensee with consent (if so revocable or irrevocable) or is he a tenant. There is absolutely no evidence of a contractual arrangement other than a family arrangement. The
F evidence furnished by the 1st defendant does not establish anything to negate that the legal title to the said land in its entirety does vest in the plaintiff. However while there are suggestions that there are other occupants who are referred to as tenants, the 1st defendant has averred that he has expended monies. This averment also lacks
G in details and particulars. Neither is there available to establish that the 1st defendant has collected rents or paid quit rents or assessments.

[26] In the circumstances of this appeal too it is not clearly borne
H out whether there is a fostering of an expectation or a unilateral mistake of a right to the claimed property. In this case, the 1st defendant as claimant persists on a stand that some form of assurance had been held out and initiated by his mother.

I **[27]** However when it is maintained that he moved out of his parents abode to occupy the claimed portion, whatever dwelling house that is built on the land would inure for his own benefit and that of his family and not really for the benefit of the land. It is

already alluded to above that there is a paucity of evidence as to the nature of contribution made by the 1st defendant in respect of other lots on the total said land. He alleged that he had contributed labour or services or even capital but his claim is still on the claimed portion of the said land.

[28] There is also an amalgam of doubt about the elements to constitute proprietary estoppel in the circumstances of this appeal. In so far as conduct and acquiescence which seem the elements strongly relied upon by the 1st defendant, the evidence does indicate that he has secured the permission of his parents to remain on the claimed portion. But the following is also observed. Upon the demise of his father, the said land was already transferred to his mother and before her demise the land was already conveyed to his brother.

[29] Assuming that the 1st defendant is successful in establishing proprietary estoppel the matter has to be considered from another aspect.

[30] The equity that is sought to be enforced here is not only for the benefit of the 1st defendant but also to be extended to his sons. Even if it were to be accepted that there is in existence "unconscionable conduct" which was not initiated or instigated by the plaintiff the ensuing question is whether there is here created a right in rem or a right in personam. There is not established here an interest arising from equity that is recognisable under National Land Code 1965. The Privy Council in *United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case* [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 in the speech of Lord Keith of Kinkel offered explanations which are useful in the context of this appeal. That case pertained to the granting of an application for relief against forfeiture. References were made to ss. 3(1) and 6 of the Civil Law Act 1956:

> Section 133 makes provision for any proprietor of alienated land who has incurred a forfeiture to apply to the State Authority for annulment of it, and gives the Authority absolute discretion to refuse the application or to allow it conditionally or unconditionally.
>
> Under sub-section (3) the Authority may, notwithstanding such refusal, realienate the land to the same proprietor upon such terms as it may determine. These provisions evince an intention that the Authority should have complete control over whether or not a proprietor who has incurred forfeiture should be reinstated, and if so upon what terms. Then section 237 provides for application to

A the court for relief against forfeiture by lessees and others whose tenure is exempt from registration. The absence of any similar provision in favour of proprietors of alienated land is a strong indication of an intention that in their case no such right of application was to be available. This argument for the appellants must therefore be rejected.

B

It was further argued for the appellants that the English rules regarding relief against forfeiture were imported generally into the law prevailing in Johore by section 3(1) of the Civil Law Act 1956 which, so far as material, provides:

C

> 3.(1) Save in so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the
> D common law of England and the rules of equity as administered in England on the 7th day of April 1956.

For the reasons already given, their Lordships are of opinion that the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not
E be available to proprietors of alienated land. Section 3(1) of the 1956 Act cannot therefore avail the appellants, since these provisions are inconsistent with the rules in question.

It is necessary to notice finally section 6 of the Civil Law Act 1956 which provides:

F

> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

G

It was argued for the appellants that this enactment did not preclude the application of the English equitable rules as to relief against forfeiture since these rules were not part of the law of England relating to the tenure of immovable property. "Tenure", so
H it was maintained, meant only the mode of holding land, and the rules of equity were something different. But, in their Lordships' opinion, laws relating to the tenure of land must, applying the ordinary and natural meaning of these words, embrace all rules of law which govern the incidents of the tenure of land, and among these incidents is the right, in appropriate circumstances, to the
I grant of relief against forfeiture.

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

[31] It is noted that the 1st defendant chose not to take any action to lodge his claim earlier. The claim is that he acted on a belief that some form of proprietary interest would accrue as a result of the continuous stay on the claimed land. It is found that the equity that he is claiming does not fall within the following provision of the National Land Code 1965 [NLC] s. 206(1), (2), (3):

> (1) Subject to the following provisions of this section:
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.
>
> (2) The provisions of sub-section (1) shall not apply to:
>
> (a) the creation of, or other dealings affecting, tenancies exempt from registration (which may be effected, instead, as mentioned in sub-section (2) of section 213); or
>
> (b) ...
>
> (3) Nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

[32] Overall there is not denied here that the 1st defendant has been permitted a licence. Although by the very nature of the permission granted the 1st defendant is said to be person with a degree of exclusive possession with his sons but it remains a license. A lengthy discussion of this is found in *Radaich v. Smith* [1959] 101 CLR 2009, Windeyer J in his judgment rendered some pertinent observation:

> ... What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be

A ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that
B a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the
C landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with a grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised
D premises. All this is long-established law: see *Cole on Ejectment* [1857] pp. 72, 73, 287, 458.

Recently some transactions from which in the past tenancies at will would have been inferred have been somewhat readily treated as creating only licences. And it has been said-especially in
E connection with family relationships, charity or hospitality-that allowing a person to have the exclusive possession of premises does not necessarily indicate a tenancy as distinct from a licence.

[33] Judith Sihombing in The National Land Code - A Commentary Binder 2 XXI para 251 explains:

F

The significance of the difference between the licence and the lease is that a licence of itself does not create an interest in land. A licence is a personal obligation; if any remedy is available on breach, then it will be damages although the general rule is that breach is
G not remediable, especially where it is a gratuitous licence. A lease on the other hand creates an interest in land which, on dispossession, entitles the lessee to recover possession of the land. The difference becomes essential also where it is sought to prove that the claimant has an interest in land enforceable against third parties and one capable of protection within the terms of the
H legislation. Without additional elements (for example a licence coupled with a grant), a licence is not an interest in land and would not be enforceable against third parties and is not entitled to any protection under the Code nor under any legislation giving security of tenure to tenants.

I

[34] Lord Denning re-phrased the concept in *Inwards v. Baker* (above) as: A

> It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity ... that the equity arising from the expectation of land does not fail ... . The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money. B C

[35] The trial judge in the course of his judgment stated, *inter alia*:

> It is clear that the 1st Defendant relied upon promises allegedly made by Balwant Singh. Such promises were not admitted by the Plaintiff to have been made. If the 1st Defendant believed he had a right to house 241-C and then saw the property transferred by his mother to his brother Balwant Singh, he could hardly be expected to have remained relatively passive, leaving it to Balwant Singh to provide for his rights to house 241-C. Further, when Balwant Singh died in 1994 the issue must necessarily surface again. On 13/1/1995 an order of distribution was made under the Small Estates Distribution Act 1965 to transfer the land to the Plaintiff. No action emerged from the Defendants. That the Plaintiff gave notice to evict the Defendants on 7/10/1998 is no worse that the Defendants own lack of diligence to establish their claim to house 241-C even after the said land upon which the house was built was transferred to the Plaintiff. D E F

[36] It is simplistic argument to say that when the plaintiff states that she has no knowledge of certain state of matters, she is therefore taken to have admitted whatever has been asserted by the 1st defendant. The 1st defendant has alleged that his mother and his brother had both made declaratory statements of intention that the 1st defendant has relied on as some form of assurances. The question here is whether when the 1st defendant chose not to initiate any action to lodge a claim it is based on the belief that some form of interest has already been vested in him. If his mother had the title transferred to his brother this would negate the assertions of the 1st defendant that there is indeed a repetition of the assurance over a long period. The 1st defendant has not succeeded in establishing a material fact, that is, that the alleged statements of the intention of the mother amounted to more than statements of revocable present intention. When no positive steps G H I

were taken by mother and brother then it is the 1st defendant who has failed to act on the faith of a belief. Apart from the danger of militating against s. 206(3) NLC 1965, we are in effect being asked to cause a metamorphosis of the licence to some form of unregistrable interest in the land not capable of recognition under the NLC 1965. We are being requested to create a proprietary interest in land tenure arising from a licence within a family relationship.

[37] No finding could be made here that the judge has misdirected himself on a question of law. This is a family arrangement where the creation of an interest in the land would be beyond the scope of land tenure under the NLC 1965.

[38] In the circumstances the conclusion of the trial judge is affirmed. However we differed from the trial judge in that it is not reasonable for the revocable licence to be withdrawn where the defendants have been ordered that vacant possession be given within four months.

[39] We substituted that with an order that vacant possession be given within six months with effect from the date of our order. Apart from this modification, we therefore dismissed the appeal with costs and the orders of the High Court are affirmed.

[40] For completeness we wish to add that there is a second appeal W-03-159-06. The appeal by agreement of the parties has been withdrawn. The appeal has been struck off with the costs to follow the outcome of this appeal No. W-02-391-04.